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UNION LABOR AND THE COURTS.

The American Federation of Labor was very badly advised when it passed at its last meeting at Atlantic City that notorious resolution declaring that "our courts and judges have been disregarding the rights of the people and exercising powers more tyrannical than any assumed by the most tyrannical despot ever known to history," and in which courts were described as the "sinister influence which is sapping the life from our institutions and creating the worst sort of autocracy."

The basis of this complaint is shown by the discussions which preceded the passage of the resolution, to be the impatience with which many people have come to regard the function of the courts to declare void, legislation that overleaps the restraining barriers of constitutional limitations.

This feeling of resentment has been fanned into flame, if not actually kindled, by the agitation of the question by laymen, lawyers, and even some judges who talk learnedly about the supreme power of the people and charge the courts with assuming the ungranted power to veto all legislation in derogation of the reserved rights of the people and of their representatives in Congress and of the various state legislatures. One supreme judge in a southeastern state has publicly indicted Chief Justice Marshall as the arch conspirator in the usurpation of this authority on behalf of the judiciary. This writer, and others who have followed him, have speculated with fine ingenuity, on the intent of the framers of the Constitution with regard to the extent of power of the courts to uphold the Constitution by refusing to enforce laws in conflict therewith, totally ignoring the great outstanding fact that this power has been exercised by the courts for nearly one hundred years without question, a most remarkable instance of construction by popular acquiescence.

The historical method of approach to a matter of this kind is useless. The Constitution itself is silent as to the courts' power to nullify legislation and the intent of the framers of the Constitution may be admitted to be at least not clear from doubt. Necessarily, at some time or another, without the "hatching up" of any "conspiracy," the courts would have been confronted with the question: Is an act which clearly goes beyond the powers of a legislature to enact enforceable in the courts? Which is greater, the Constitution or Congress? If Congress, like Parliament, is omnipotent, then let us tear up the Constitution: it is but a scrap of paper if no power exists to define its provisions or to enforce its inhibitions.

Our good friends in the labor organizations, who desire as much as any other body of our citizenship to preserve the integrity of our republican institutions, have been misled, as have many other good people, by the charge that the courts "nullify" or "veto" legislation. The effect may possibly be similar, but the process by which the result is arrived at is so different, so important and so vital to individual rights that a little careful consideration will convince any reasonable man that, if the question were today one of first impression, the courts could not act otherwise than they have always acted wih respect to so-called unconstitutional legislation.

In the first place it must be remembered that this is a government of *limited* powers; that Congress is not greater than the President or the courts. These three departments of government are co-equal and each is supreme in its sphere under the Constitution. The

court's peculiar function is to declare and enforce the law. If there were no Constitution, the result would be, as it is in England today, that the courts would simply determine what an Act of Congress meant and enforce it. But the United States has a written Constitution, which is higher than Congress or the President or the Courts. It is true that officials in all three departments of the government are sworn to support the Constitution but to the courts only is given the power to declare the meaning of a constitutional provision, just as they, and they only, can declare the meaning of a statute.

Unlike the President, the courts have no right to "veto" an Act of Congress; they have no concern with the expediency or the policy of any statute. In fact they cannot officially pass upon any Act of Congress except in the strictly judicial process of declaring the law applicable to a state of facts properly presented to them for their decision. In this procedure an Act of Congress is relied upon by the plaintiff and unless a higher law interferes the court will simply declare the meaning of the statute and give its decree in accordance with the law so defined and the facts set out in the record. If, on the other hand, the defendant sets up a provision of the Constitution which he alleges is in conflict with the Act of Congress what is,—indeed, what must be the duty of the court? First of all, in the exercise of its judicial function, the court must declare the meaning of the provision of the Constitution relied upon, and if the constitutional provision as thus defined is clearly in conflict with the Act of Congress, which law must the court follow? Clearly, they are bound to observe their oath to support the Constitution and hold that the Act of Congress cannot be "enforced" in that proceeding, since to do so would compel the court to give a judgment in conflict with the Constitution. This, the courts could not do, nor could Congress, which is not superior in authority to the courts, compel them so to do. It does not help the argument to contend that Congress also is pledged to support the Constitution. Congress has no power to define the meaning of that instrument; that is strictly a judicial process, and when Congress and the courts disagree as to the meaning of the Constitution, the view of the courts must control, since it is the peculiar function of courts to define and declare the law.

Our labor organizations forget how often their own members have been protected in their constitutional rights by decisions of the courts, sustaining the Constitution as against acts of unfriendly legislatures which sought to deprive them of rights guaranteed by the Constitution. How often in the beginning of their struggle to secure recognition as an organization, have they had to rely on the constitutional right of free speech and of peaceable assembly? This was at a time when they were greatly in the minority, both as to actual representation of men who labor and with respect to those of the public who sympathized with their program. Now that they are clearly a majority influence in the counsels of the Republic, they should not too readily forget that the same Constitution which protected them from the ill will of the majority still exists to protect those upon whom they may, unlawfully, seek to impose their will through legislation, and that the same courts must still stand fearless and ready to enforce that same Constitution in the face of clamoring majorities and protect the individual whose personal rights are threatened, as they have always done in the past.

A little reflection will show the tremendous value to a Democracy of a written Constitution, provided there exists a fearless judiciary capable of upholding its guaranties even to the extent of tak-

ing the side of one man against the demands of a hundred million. Majorities are temporary. Today a man may be one of the crowd which is controlling things; tomorrow he may be in a hopeless minority. His personal safety and the security of the little property he has accumulated through years of toil, would be in constant danger but for the fact that a fearless judiciary and the panoply of a protecting Constitution are between him and those who would take his life or his property even where such act might be authorized by a legislature representing a temporary majority.

A few months ago an election was held in Russia. The two great parties were the Bolsheviki and the Menshiviki. Literature was widely circulated urging the voters to vote for the several candidates and one of the reasons given by the Bolsheviki for a return to power was that the Menshiviki would overturn all the laws passed by the Bolsheviki, would refuse to recognize the judgments of their courts and would forcibly deprive all Bolshevists of their property and give it to the Menshevists. This is the *reductio ad absurdum* of a Democracy where the life and property of the individual is not safeguarded from the demands of majorities whose unjust and often unreasonable demands are not restrained by a Constitution enforced by a judiciary strong enough to maintain its provisions.

NOTES OF IMPORTANT DECISIONS.

INTOXICATING LIQUORS—IS BEER AN INTOXICATING LIQUOR?—The decision of District Judge Rose at Baltimore, July 1, 1919, has created much debate and confusion throughout the country. The rather strange reason given for sustaining an indictment for selling beer in Baltimore, i. e., that the people of Baltimore should have the same "privileges" as the people in New York, where it was held that the War Time Prohibition Act applied only to "intoxicating" liquor, is one which can be advanced with much force in every other district and will tend to prevent the enforcement of the Act as to beer until a decision of the Supreme Court is rendered. The full opinion of Judge Rose follows:

According to the dictionary, beer is an alcoholic beverage resulting from the fermentation of cereals or other starchy substances. To be beer it must contain alcohol. If it contains so little that nobody wants it because of the alcohol in it, it is not beer from any practical standpoint. The Internal Revenue Department, years ago, had to deal with this question. The statute taxed all fermented liquors. When was a liquor fermented? The department answered that fermentation had not taken place enough to make it within the taxing meaning of the words "a fermented beverage" unless it resulted in an alcoholic content of at least one-half of 1 per cent. If Congress had forbidden anyone to sell beer or other fermented liquor, beer containing one-half of 1 per cent or more of alcohol would have been covered by the statute. Congress has not used those words. It has used others which may mean that it intended to forbid the making and sale of nothing which is not intoxicating. I must confess that my mind has a tendency towards what might be called a historical rather than the more or less artificial legal construction of such an enactment. I have no doubt that everybody who in Congress voted for or against the statute, and practically everybody affected by it, supposed at the time it was enacted that it covered all beer containing any appreciable amount of alcohol. That view is not shaken by the critical analysis to which the statute has been subjected. The contemporaneous interpretation of what they were doing at the time by all who had any part in the doing is to my mind more persuasive than the most careful analysis made after the event. So holding, had this question come up four or five weeks ago, I would have overruled the demurrer. I do not do so now because it is evident that in many minds there is much doubt as to what the statute does mean. It is a penal law and it may not be so interpreted as to make punishable anything which it does not clearly forbid. I cannot now say that it clearly forbids the making or sale of beer which is not intoxicating, because five of the judges of the Second Circuit have each expressed the opinion that it has no relation to anything which is not intoxicating. I have profound respect for their opinions not only because they are judges, but because they are unusually able men. It is impossible for me to say that the construction they put upon the statute is not one which a reasonable man might put on it, even though it may not be the one that I should personally have put on it had I known nothing of their views. It is, moreover, very important that this act shall be uniformly construed and that it shall mean the same thing in Maryland as in New York. Moreover, the error committed in sustaining the demurrer can be much more speedily and con-

veniently corrected than the opposite mistake. I shall therefore sustain the demurrer. What is the practical effect of so doing? It merely is this: Until the Supreme Court decides differently, prosecutions are not likely to be instituted in this district against any man for selling any fermented or vinous liquor which is not intoxicating. If he sells any that is intoxicating he breaks the statute and can, and I suppose will be, immediately prosecuted. It may be well for all to bear in mind that I have not decided, nor, so far as I know, has anyone as yet decided, that two and three-quarter per cent beer is not intoxicating. All that has been determined on that question is that the affidavits presented by the brewers in New York that it is not were strong enough to induce the United States court to restrain the Collector of Internal Revenue from refusing to sell stamps, etc., to the brewers of that beverage. If anyone makes or if anyone sells it and the jury shall determine that what he made or sold is intoxicating, he will be liable to the penalty and is liable, I take it, in New York, as anywhere else. Moreover, if the Supreme Court shall ultimately decide that the government's contention is right, anyone who now sells any beer containing one-half per cent or more of alcohol will be then subject to indictment for everything he has done in that respect since July 1st. I do not know that anyone is forced to sell such beer or to make it, and if he takes the chance and sells it to make money by so doing and the Supreme Court concludes that he has broken the statute, he has no claim to special leniency of treatment.

ARE TWO CORPORATIONS DISTINCT ENTITIES WHERE THE SAME STOCKHOLDERS CONTROL BOTH?—If the question asked in the heading to this note had been asked twenty-five years ago, the interrogator would have been regarded with curiosity. The idea that a corporation is a legal entity, separate and distinct from the stockholders who control it, has for a long time obtained. Characteristic of the earlier decisions is the following quotation from the opinion of the court in People v. Watertown, 1 Hill (N. Y.) 616. "The individuals comprising these associations are united in one body, and the members lost in the corporate existence. It is not the individual members but the legal being which acts and transacts business."

There is a modern tendency, however, to revise this doctrine, especially in the effort to circumvent the plans of those who wish to evade some legal responsibility. We do not know of any court that has gone further in this direction than the Supreme Court of Louisiana in the recent case of Burke-Scanlon Co. v. Railroad Commission of Louisiana, 81 So. Rep. 727.

The facts in this case present a sharp, clear issue. The plaintiff brings the suit to enjoin the railroad commission from putting into effect an order requiring them to continue to operate a railroad built by them for lumber purposes, but subsequently leased to the Kentwood & Eastern Ry. Co., a corporation composed practically of the same stockholders. The plaintiff claimed that it did not have the power to operate the road and that the order should have been directed to the Kentwood & Eastern Ry. Co. But as this latter company was financed by the plaintiff the commission directed its order against the plaintiff. The trial court found for plaintiff and enjoined the commission. This decree the Supreme Court set aside (two judges dissenting). The court said:

"Plaintiff is admittedly a corporation engaged in business in the state of Louisiana, and as such it is amenable to the laws of the state. It is the owner of a railroad bed, including cross-ties and rails, which it acquired with its sawmill and lumber business, which road had been operated by two of its predecessors in the same business; it entered into a contract of lease with the Kentwood & Eastern Railway Company, and assumed the role of lessor. The lessee was a subordinate or affiliated corporation, or an interlocking corporation, with the plaintiff; the incorporators of the one being the stockholders of the other. We do not think that the contract of lease operated a discharge of plaintiff from continuing the services of a common carrier on its railroad."

The law is beginning to distinguish, as it should, between corporations whose stockholders are different and those where the stockholders are the same, or, as the Louisiana court calls them, interlocking corporations. The latter are not and ought not to be regarded as separate entities. On this point the Louisiana court said: "When five persons organize themselves into a corporation, or intellectual being, and cause that organization to be acknowledged before two law officers, and call the organization by two or three different names, the intellectual beings are really one and the same."

The same principle in general terms has been recently announced in New York in the recent case of Quaid v. Ratkowsky, 183 App. Div. 428 (Affmd. 224 N. Y. 624), where the court said: "While the courts of law strictly observe the fiction of corporate entity, there has been for years a growing indisposition to permit corporate entity to be employed either as an instrumentality or as a cloak for fraud or for successful evasion of the law."

CONSTITUTIONALITY OF THE COVENANT OF THE LEAGUE OF NATIONS.*

I am in receipt of your favor of June 14th, requesting my opinion on the constitutionality of the covenant of the League of Nations. I have been giving this subject considerable investigation because of its great importance, and because of my great interest in the establishment of a League of Nations in which the United States should be a party for the purpose of minimizing war, and establishing peace throughout the world, and for no other purposes.

If the present League is adopted it will come to us through the treaty making power of the government, and of course, therefore, it can contain only those provisions which the treaty making power can constitutionally make, and can contain none which that power is forbidden to propose. No agent can exceed his powers, and the treaty making power in this regard is confined to the proposal of such measures as are permitted to it under the Constitution of the United States.

In Article XVI, Section 2, of the covenant, the council is authorized in case of threatened war to *recommend* to the several governments the military and naval forces that each shall contribute to the armed forces to be used to protect the covenants of the League. Practically the same action is required in the case of the reduction of armaments under Article VIII, Section 2. These two provisions clearly show that our conferees at Paris recognized that the treaty power could not grant to the League of Nations the power of declaring war, or the reduction of armaments without the affirmative action of Congress. The care with which the right of Congress to declare war and raise armies is recognized in these two instances in the covenant it is claimed by some is not observed in Article X, and this criticism may be well founded.

Article X binds the League to preserve against external aggression the territorial integrity of every member of the League. "In case of any such aggression * * * the council shall *advise* upon the means by which this obligation shall be fulfilled." In the two cases referred to above the council are required to *recommend* to the several governments for their action. Whether the words in Article X, "the council shall advise upon the means," etc., mean that the council shall recommend to the several governments what action shall be taken by them, it is impossible to say. It would seem that the authors of Article X who had recognized in Articles XVI and VIII that war could not be declared, or disarmament accomplished by the League without the consent of the several governments regarded the words "the council shall advise upon the means," as indicating that in this case as in the others they intended their action to be ratified by the several governments of the states of the League. The makers of Articles XVI and VIII, who felt the necessity of each state determining for itself the question of war, or disarmament, could scarcely have intentionally left to the League the power to declare war in this article which they had denied to it in the other articles. This defect, if such it be, can be easily cured, as I will suggest subsequently.

The fundamental principle to be observed is that the treaty power in creating the covenant cannot annul any power of Congress given it under the Constitution, unless the treaty power is supreme over the power of Congress. This, the

*At our urgent request, Hon. H. St. George Tucker, of Lexington, Va., author of Tucker on Limitations on the Treaty-Making Power, has kindly prepared for us in the following article, a statement of his views on the subject of the constitutionality of the League of Nations covenant. Since Mr. Tucker is an authority of high standing on the subject of treaty-making powers, his views will doubtless attract the attention of lawyers throughout the country.—Editor.

decisions of the Supreme Court show, is not true, since an act of Congress may annul a previous treaty, and a subsequent treaty annuls a prior act of Congress that conflicts with it.[1] This being the case, should the covenant of the League created under the treaty power attempt to give the League of Nations the power to declare war, this treaty could be abrogated by an act of Congress. Of what use is such a power to be given if it can be taken away as described? And what applies to the power of Congress to declare war and to raise armies, applies equally to every other grant of power to Congress in the Constitution, and the reason for it is quite obvious. Article VI of the Constitution gives supremacy to treaties and laws of Congress equally. The language giving them supremacy is exactly the same, but the grant of powers to Congress in Article I, Section 8, including seventeen grants, are all specific: to levy taxes, to regulate commerce, to coin money, declare war, etc. Each is a *specific* grant, and included in each is everything which pertains to that specific thing. The provision of the Constitution which gives to the President and Senate the power to make treaties, is not a specific, but a general grant of power, for the word "treaty," which in effect is only a contract between two or more nations, may embrace in its provisions *any* subject, embracing the personal and property and political rights of citizens. A treaty, therefore, between the United States and Great Britain might embrace the subject of war, raising armies, coining money, or any of the specific grants made to Congress. But the well settled doctrine where in the same instrument there is a general and a specific grant that the general grant is modified by the specific, applies equally in the construction of the Constitution.

A man in his will leaves all of his real estate to his wife, and in a subsequent clause leaves his home place to his son. The general devise of *all* of his real estate to his wife will be modified by the *specific* devise to his son of the home place. Judge Story, in speaking of the treaty power, says: "A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it: and cannot supersede, or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces the right to annihilate any other."[2]

The argument is frequently advanced that while admitting the fact that the treaty power cannot declare war, because Congress under the Constitution alone has that power, yet that when a treaty binds the United States to declare war, that Congress is *morally* bound to carry out the treaty by declaring war. I am forced to dissent from this proposition most emphatically. If the power given to Congress to declare war means anything, it means that the power must be exercised by the free, independent and untrammelled judgment of the representatives of the people, or it means nothing. To be morally bound is as effective as is being legally bound. It is the equitable "ought," "duty," "obligation." Indeed, the moral obligation is even stronger than the legal. If the treaty power has such authority it cannot be denied that it has the power to "annihilate" the power of Congress, which Judge Story says cannot be and which von Holse[3] also denies. In other words, if under this theory, Congress must declare war, it is clear that it has no independent action. When the treaty power, therefore, attempts to declare war, it attempts to do what it has not the power to do, for that power is lodged in another arm of the gov-

(1) Foster v. Neilson, 3 Peters, 314 Cherokee Tobacco Case, 11 Wallace 616.

(2) Story on the Constitution, Sec. 1508. See also authorities quoted in Limitations on the Treaty Making Power (Tucker), Chap. 1, page 4.

(3) Page 202.

ernment. Take an analogy: A, a married man enters into a written contract to sell "Highacre," which he owns, to B. B files a bill in equity asking the chancellor to specifically execute the contract—with all the necessary averments of such a bill on the part of the complainant. A's wife declines to sell and to execute the deed, and A answers the bill in effect as follows: "A circumstance *over whom* I have no control prevents my executing the contract. I am ready to sell and convey, but my wife won't agree to it." The court has no power to compel the wife to join in the deed, for she was not a party to the contract, and the bill must be dismissed unless B is willing to take a deed from A without his wife joining in it. The treaty power may make a treaty (a contract) agreeing to declare war, but it is valueless without the act of Congress to execute it—and immorality cannot be imputed to Congress for declining to do what their best judgment does not approve.

Judge Charles E. Hughes, in speaking before the Union League Club of New York, on March 26, 1919, enforces this view strongly:

"The extent to which Congress would regard itself as bound, as a matter of good faith, to enact legislation for the purpose of carrying out treaties has been the subject of debate, from time to time, since the days of Washington. Despite these debates, and notwithstanding its power to frustrate the carrying out of treaties, Congress in a host of instances has passed the necessary legislation to give them effect; and the disposition has frequently been manifested to avoid any basis for the charge of bad faith through a disregard of treaty stipulations." * * *

Congressional precedents in cases where Congress has been in accord with the policy of treaties are of slight value as a guide to the attitude of Congress in a future controversy with respect to the provisions of this covenant. There is nothing in our history to give assurance that Congress would recognize the authority of the treaty power to bind Congress to declare war in a cause that it did not approve. *The decision as to the policy, as to existence of the duty, and as to the power to create the duty, would rest with Congress.* Whether or not Congress would feel itself bound to respond, or would take the position that, in so vital a matter as a resort to war, it could not be pledged in advance without its consent, is a question which must be left to the event. The discussions which have repeatedly taken place in the House of Representatives show that the question involved is a mooted one.[4]

Article XVIII of the covenant is objectionable in that it attempts to declare when a treaty made by the United States shall be binding. It declares that every treaty must be registered with the secretariat, and that until registered, no such treaty shall be binding. Of course, the League of Nations has no power to prescribe the conditions on which a treaty made by the United States shall be valid.

I can see no object in placing Article XXIII in a covenant for a League of Nations that has for its purpose the elimination of war, and the establishment of world peace. Most of its provisions, if not all, have for their object a good purpose, but why should it be incorporated in a league that has for its object one specific purpose. Peace! Is not the question of labor a domestic question? and how will the League "*secure* and *maintain* freedom of transit and equitable treatment for the commerce of all members of the League" unless it has a power which is not disclosed in this covenant? Congress alone can regulate commerce with foreign

(4) See also Tucker's Limitations on the Treaty-Making Power, Chapter XI.

nations. Surely it is not proposed that the League of Nations is to assert this power. Should this be its object, of course, it cannot be accomplished any more than the League could declare war, for the power over commerce is granted to Congress alone, as is the power to declare war. This article seems to be out of place, uncertain, misleading, and, in my judgment, more liable to lead to war than to prevent it.

The results of this awful war should lead the world into the paths of peace, and no measure is better adapted to this purpose than a league of nations to prevent war, but in seeking this end we should be careful that our work should be open to no Constitutional objection, and that our allies should understand that in entering the League we do so under the limitations and restrictions of the Constitution of the United States in all respects. If, therefore, there be doubts as to whether in all respects the covenant conforms to the provisions of our Constitution, I would suggest that in its ratification a reservation should be incorporated in the following language, which would neither stay the dawn of final peace, nor delay the resumption of relations of the states that have been at war.

RESERVATION.

It is understood by the Senate of the United States in ratifying the covenant of the League of Nations that no power vested by the Constitution of the United States in the executive, the legislative, or the judicial departments of the government of the United States, or in any department or officer thereof, or any power reserved to the several states under the Constitution of the United States, is vested in the League of Nations.

H. ST. GEORGE TUCKER.

Lexington, Va.

RELEASE—INDEPENDENT TORTFEASORS.

WHEAT et al. v. CARTER.

Supreme Court of New Hampshire. Hillsborough. Feb. 4, 1919.

106 Atl. 602.

The release of one joint tort-feasor is a bar to suit against the others, which is also true as to the effect of a release when the releasor's loss is caused by the concurrent misconduct of the releasee and others.

Petition for an injunction. Hearing by Kivel, C. J., who found that the defendant injured his hand on October 10, 1915, and employed the plaintiffs to treat the wound. They burned his hand on November 10th of that year while examining the wound with an X-ray machine. The effect of the burn was noticeable by November 16th, and the full extent of the injury was apparent a few days later. The defendant was employed by Fellows & Son at the time his hand was injured, and on December 10th he gave them a release of all claims and demands he might have against them. Later the defendant brought suit against the plaintiffs to recover the loss he sustained as the result of their use of the X-ray machine. The court ruled that the release was not necessarily a bar to the suit, and found that the defendant's loss did not result from a single indivisible wrongful act and dismissed the petition. Transferred on the plaintiffs' exceptions to that ruling and finding.

YOUNG, J. (1) It is settled in this state that the release of one joint tort-feasor is a bar to a suit against the others; and that is also true as to the effect of a release when the releasor's loss is caused by the concurrent misconduct of the releasee and others. Carpenter v. W. H. McElwain Co., 78 N. H. 118, 97 Atl. 560. That, however, is all the Carpenter Case decides. The question, therefore, of the effect of a release in a case like this, is an open one in this jurisdiction, and there is nothing which can be called a consensus of opinion in other jurisdictions as to the effect of a release of one wrongdoer on the releasor's right to sue the others even in cases in which his loss results from their concurrent misconduct, to say nothing of its effect when, as in this case, the releasor's loss resulted from successive wrongful acts. Note 14 L. R. A. (N. S.) 322. In other words, an examination of the cases in which the effect of a release of one tort-feasor

has been considered will show: (1) That all courts hold that the release of one joint tort-feasor is a bar to a suit against the others; (2) most courts hold that that is true when the releasor's loss is caused by the concurrent misconduct of two or more persons (State, Use of Cox, v. Maryland Electric Ry. Co., 126 Md. 300, 95 Atl. 43, L. R. A. 1917A, 273); and (3) that, when the releasor's loss is caused by the sucessive acts of two or more persons, most courts hold that the release of one is not necessarily a bar to a second suit. Since this is so, it will be necessary to determine the rule to be applied to decide the rights and liabilities of the parties to this proceeding. When we are considering this question, it will be helpful to have clearly in mind the foundation on which the rule rests.

It is said that the rules of the common law are logical deductions from the fundamental principles of justice, and that these principles are evidenced by the decided cases; and an examination of the cases in which the rule in question has been considered will show that it depends for its validity on the proposition that it is inequitable to permit one who has been fully compensated for a loss to recover compensation a second time for the same loss. Lovejoy v. Murray, 3 Wall. 1, 17, 18 L. Ed. 129.

(2-4) The reason, therefore, that a settlement with one of several tort-feasors is ever a bar to a suit against the others, is because he has been fully compensated for the loss for which he is seeking to recover in the second suit. Since this is so, the question in this case is whether the defendant has already been compensated for the loss he sustained as the result of the plaintiff's use of the X-ray machine, not, as the plaintiffs contend, whether Fellows & Son may have been liable for that loss. In other words, the test to determine whether the release is a bar to a suit against the plaintiffs is to inquire as to the extent of the claim he made at the time he settled with Fellows & Son. Was he claiming to recover all the loss he sustained as the result of the original injury to his hand or only the loss which resulted immediately from that injury? However the fact may be in other states, in this jurisdiction the issue raised by that inquiry is an issue of fact to be determined, like all such issues, by the weight of competent evidence. The question, therefore, which is raised by the plaintiff's exception to the sufficiency of the evidence, is whether it will warrant a finding that the defendant has not been compensated for the loss he is seeking to recover from the plaintiffs. It is permissible, when considering that issue, to consider the plaintiff's testimony, even though it may contradict the terms of the release. Libby v. Mt. Monadnock Mineral Spring & Land Co., 67 N. H. 587, 32 Atl. 772; Glidden v. Newport, 74 N. H. 207, 209, 66 Atl. 117. In short, notwithstanding Fellows & Son may have been liable for all the loss the defendant sustained, and the release included all claims he might have against them, it is permissible for him in this proceeding to show just what he was claiming when he settled with them, for the plaintiffs were not parties to the release. In other words, the release in and of itself is not a bar to the defendant's suit against the plaintiffs, but, if he has already been compensated for the loss he is seeking to recover in that suit by Fellows & Son, that fact is a bar to the suit.

(5) If the exception to the evidence is intended to raise the question of the sufficiency of the evidence to warrant the finding that this defendant has not been compensated for the loss, it is enough to say that that is the effect of his testimony; for he says he relied on the promise of one of the plaintiffs "to fix it all right" after his hand healed. If this exception is intended to raise the question of the sufficiency of the evidence to sustain a finding that the defendant's loss did not result from a single indivisible wrongful act, it is enough to say that that is the only finding the evidence will sustain. It is true, as the plaintiffs contend, there is no specific finding that the defendant made no claim against Fellows & Son for the loss he sustained as a result of the plaintiff's misconduct, but the general finding is in his favor, and that, as the case now stands, must be held to include such a finding, for that is essential to its validity.

If, as the plaintiffs contend, the court has not in fact passed on that question, they should apply for a further hearing or for an amendment of the case in the superior court.

Plaintiff's exceptions overruled.

PLUMMER, J., was absent.

The others concurred.

NOTE—*Release to One Independent Tortfeasor as Bar to Action Against Others.*—The rule is quite familiar and generally, if not universally recognized, that release of one joint tortfeasor is a bar against action against others. But how stands the matter when there is concurrent, but not joint, misconduct by different wrongdoers in bringing about one injury or where there are successive independent wrongs? The view by the instant case seems to be that plaintiff could have

claimed for the entire loss caused by original injury or only for what immediately ensued, reserving the right to sue for loss attributable to a successive wrongdoer.

It seems to me that it is somewhat inapt, if not inept, generally, to speak of joint tortfeasors. The only thing the law aims at is to prevent a double recovery for one wrong. As said in Berkley v. Wilson, 87 Md. 222, 39 Atl. 502, "whether the wrongdoing be the joint act of the * * * defendants or the several tort of each can make no difference. * * * If the (two) defendants had both been sued * * * there could, of course, have been but one recovery. And it would seem to be very clear, upon reason and authority as well, that the same result must follow when the same injury is caused by the independent acts of several wrongdoers. The reason of this rule is apparent. It is neither just nor lawful, that there should be more than one satisfaction for the same injury, whether that injury be done by one or more."

In Cleveland v. Bangor, 87 Me. 264, 32 Atl. 892, 47 Am. St. Rep. 326, even more pointedly was it said that: "No sound reason has been given, and it is believed that none can be assigned for a distinction between cases of wrongdoers who are jointly and severally liable and those who are severally liable for the same injury. In either case the sufferer is entitled to but one compensation for the same injury and full satisfaction from one will operate as a discharge of the others."

In Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129, Justice Miller goes thoroughly into the reason of the rule regarding tortfeasors and in condemning the contention that a suit against one trespasser does not prevent suit against a co-trespasser, says: "The judgment against his co-trespasser does not affect the other so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser do this, and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages."

There would seem, then, something in the way of estoppel or as matter of public policy standing in the way of a second recovery. There is a wrong done but it has been compensated for and the law aims to go no further at the suit of anyone. There has come about a *damnum absque injuria* and one shall not be vexed in such a case.

In Pittsburgh R. Co. v. Chapman, 145 Fed. 886, 76 C. C. A. 418, decided by Third Circuit Court of Appeals, Judge Gray, speaking for the court, held that a release given to the relief department of a railroad company from all damages from all claims for injury could not be shown by an independent tortfeasor regarding a particular injury because "no joint tort of the defendant and" (another railroad company in whose favor the release was, was averred or shown). The opinion cites only Thomas v. Railroad Co., 194 Pa. 514, 45 Atl. 344.

That case says: "Neither the pleadings nor the evidence averred or showed any joint negligence or joint liability of the defendant and the Baltimore & Ohio R. Co. * * * It may be the latter company was also liable to the plaintiff * * * but such liability, if it existed, is based on different grounds, namely, a negative act of omission by the railroad and not a positive act of commission." But, why should there be any liability over, after satisfaction for a wrong, for a "negative act of omission," when, if it, the act, had been positive, so as to make one a joint tortfeasor, with another, it would have been released from wrong? To extend this reasoning, would make release for joint wrongdoers in the release of one, even in the commission of crime, when one less guilty might not be thereby released.

In Gallagher v. Kemmerer, 144 Pa. 509, 22 Atl. 970, 27 Am. St. Rep. 673, the court last referred to, held that where in a pollution of a stream, each act of different wrongdoers was separate and independent, they are not joint trespassers, though united in their consequences, and the difficulty in fixing the amount of damage caused by each was not the effect of making the wrongdoers joint and several tortfeasors. The court said: "Without concert of action no joint suit could be brought against all, and clearly this must be the test; for if defendants can be held liable for the acts of all the others, so each and every owner (of a colliery) can be made liable for all the rest, the action must be joint and several." But this reasoning really begs the question. It has not been held there must be "concert of action," in the sense that there must be intent or agreement to act in, concert for two or more to be joint tortfeasors. The acts done may be greatly fortuitous as to each actor. They must simply contribute or concur in contributing to a certain injury a damage. There need be nothing contractual in the nature of the wrong at all.

This subject, at least, gives reflection as to whether or not the rule ought to be as the instant case holds, viz.: to allow a plaintiff to separate his claim against any wrongdoer from that he makes against another and ask damages up to any stage of the injury that results and reserve his right to sue another for the whole damage that ensues. If he gets satisfaction from the second suit let that be a bar against recovery in the other, but if he obtains judgment and satisfaction in the former, let that operate *pro tanto* only, with a jury to determine what proportion it bears to the entire injury. Also we lately saw that against a corporation punitive damages were not recoverable. Why, then, should not it be open to sue an individual for compensation and punitive damages and if release is given to a corporation, let the release operate only as to the compensating damages. C.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE AMERICAN BAR ASSOCIATION.

The American Bar Association will meet this year at Boston, Mass., September 3rd to 5th inclusive.

All meetings of the Association will be held in Huntington Hall, Rogers Building, 491 Boylston street.

The Executive Committee will meet on Tuesday, September 2, at 8 p. m., at the Copley-Plaza Hotel.

The General Council will meet in Room 12 (first floor), Rogers Building. The first meeting of the General Council will be held on Wednesday, September 3, at 9 a. m.

The Offices of the Secretary and Treasurer will be in the Salon (first floor), Copley-Plaza Hotel, and will open for registration of members and delegates and for the sale of dinner tickets, on Tuesday morning, September 2, at 10 o'clock.

Business Program of the Association.

Wednesday Morning, September 3, at 10 o'clock:

Address of Welcome: His Excellency Calvin Coolidge, Governor of Massachusetts; The President's Address: "Government," by George T. Page, of Illinois, President of the Association; Report of Secretary; Report of the Treasurer; Report of the Executive Committee; Nomination and Election of Members.

State delegations will meet in the Rogers Building, on the first floor (under Huntington Hall) at the CLOSE of this session to nominate members of the General Council, and to select nominees for Vice-President and Local Council for each State.

Wednesday Evening, September 3, at 8 o'clock: Address: Dr. David Jayne Hill, of New York; Election of the General Council.

Reception in the Ball Room, Copley-Plaza Hotel, at 9:30 p. m.

Thursday Morning, September 4, at 10 o'clock: Reports of Standing and Special Committees.

Thursday Afternoon, September 4, at 2:30 o'clock: Report on American Law of Courts-Martial; Discussion; Unfinished Reports of Committees.

Thursday Evening, September 4, at 8 o'clock: Address: Robert Lynn Batts, of Texas, "The New Constitution"; Submission for Adoption of Revised Constitution and By-Laws of the Association.

Friday Morning, September 5, at 10 o'clock: Address: Albert C. Ritchie, of Maryland, "Power of Congress to Tax State Securities under Sixteenth Amendment"; Discussion; Unfinished Reports of Committees; Nomination and Election of Officers; New Business.

Friday Afternoon, September 5, at 2:30 o'clock: Address: Robert Lansing, Secretary of State, "Some Legal Questions of the Peace Conference"; Miscellaneous Business.

Annual Dinner at 7 p. m.; Dinner to Ladies at 7 p. m.

Conference of Bar Association Delegates.

The Conference will meet on Tuesday, September 2. There will be three sessions on that date, at 10 a .m., 2 p. m. and 8 p. m., respectively. The sessions will be held in the Jacob Sleeper Hall, Boston University, 688 Boylston street. Elihu Root, of New York, will preside.

No papers will be read. The committee appointed by the last Conference suggests the following topics for consideration. Delegates having special information upon these topics will be ready to take part in the discussion. All are invited to suggest such further or other topics as they deem important:

A. The Relation of the Trust Company to the Practice of the Law.

B. The Proposal of the American Judicature Society for the Incorporation of the Bar in the Several States.

C. How to Secure Uniform Administration of the Act for the Removal of Causes from State to Federal Courts.

Section of Legal Education.

The session will be held in Lecture Hall, Boston Public Library, Copley Square, Wednesday, September 3, at 3 o'clock. The order of business will be as follows:

Annual Address of the Chairman, William A. Blount, of Florida; Papers and Discussion, in a Conference of University Presidents, Law School Teachers, State Bar Examiners, Members of Legal Education Committees of State Bar Associations, and others interested, on the Growing Importance of, and the Best Way to Secure, a Broad Liberal Education for American Lawyers; Resolutions in the Section and action thereon; Election of Officers.

Comparative Law Bureau.

The session will be held in Room F (second floor), Boston University, College of Business

Administration, 525 Boylston street, Wednesday afternoon, September 3, at 2:30 o'clock. It will be open to the public.

The order of business will be as follows:

Annual Address of the Director, Simeon E. Baldwin, of Connecticut, on "The Growth of Law in the Past Year"; Treasurer's Report; Election of Officers and Managers; New Business.

Section of Patent, Trade-Mark and Copyright Law.

The session will be held in Room C (second floor), Boston University, College of Business Administration, 525 Boylston street, on Wednesday afternoon, September 3, at 3 o'clock.

Melville Church, of the District of Columbia, Chairman of the Section, will preside.

Address: Alan D. Kenyon, of New York, "Proceedings *in rem* in Patent Causes"; Discussion.

Judicial Section.

The Section will meet in the Jacob Sleeper Hall, Boston University, 688 Boylston street, on Wednesday, September 3, at 2 p. m. The order of business will be as follows:

Introduction of Judges; Remarks by Thomas C. McClellan, of Alabama, Chairman; Address: A. Mitchell Palmer, Attorney General of the United States; Address: H. E. Randall, of Minnesota; Discussion: Removal of Causes from State to Federal Courts; Resolutions by the Section; Election of Officers.

Section of Public Utility Law.

The second annual meeting of the Section will be held in Room F (second floor), Boston University, College of Business Administration, 525 Boylston street. There will be three sessions on Tuesday, September 2, 10 a. m., 2 p. m. and 8 p. m., respectively. The order of business will be as follows:

10 a. m. Address of R. E. Lee Saner, of Texas, Chairman; Report of Secretary; Appointment of Committees; Address: Thomas B. Love, of Texas, "The Public Interest in Public Utilities"; Submission of questions by members of the Section of which discussion is desired during the meetings; Miscellaneous Business.

2 p. m. Address: Richard T. Higgins, of Connecticut; Address: C. A. Prouty, of District of Columbia; Discussion of subjects submitted at morning session; Reports of Committees; Election of Officers; Miscellaneous Business.

8 p. m. Address: Roscoe Pound, of Massachusetts, "Administrative Application of Legal Standards"; Continuation of discussion of subjects submitted at morning session; Miscellaneous Business.

National Conference of Commissioners on Uniform State Laws.

The twenty-eighth annual Conference will be held in the Banquet Hall, Hotel Vendome, beginning Wednesday, August 27. The sessions will continue on Thursday, Friday, Saturday, Monday and Tuesday, August 28, 29, 30, September 1 and 2.

The Executive Committee of the Conference will meet on Tuesday, August 26, at 8:30 p. m., in the Banquet Hall, Hotel Vendome.

Wednesday, August 27: Address of President, William A. Blount, of Florida; Report on Constitution and By-Laws; Reports of officers, and of standing and special committees; Discussion of those reports which do not present drafts of Acts.

Thursday, Friday, Saturday, Monday, August 28 to September 1. Consideration of the following Acts: Fourth Tentative Draft of a Uniform Occupational Diseases Act; Proposed Anti-Loan Shark Bill; An Approved Set of Forms Under the Uniform Land Registration Act; Bill to Carry into Effect the National Prohibition Amendment; Fourth Tentative Draft of a Uniform Vital and Penal Statistics Act; Bill on Declaratory Judgments; Second Tentative Draft of an Act Concerning Depositions; Second Tentative Draft of an Act Concerning Proof of Statutes of Other States.

Tuesday, September 2: Unfinished and miscellaneous business.

American Institute of Criminal Law and Criminology.

The eleventh annual meeting of the Institute will convene on Tuesday, September 2, at 2:30 o'clock, in the Men's Study, Boston University, College of Business Administration, 525 Boylston street.

The Register will be kept in the offices of the Secretary and Treasurer of the American Bar Association. They will be open during the entire week for the registration and reception of members and distribution of the *Journal of Criminal Law and Criminology*, and reports of committees.

Tuesday, September 2, 2:30 p. m.: Committee Reports; Insanity and Criminal Responsibility; Probation and Suspended Sentence;

Crime and Immigration; Drugs and Crime; Indeterminate Sentence, Parole and Pardon; Public Defender; Metropolitan and State Police.

Tuesday, September 2, 8:30 p. m.: President's Address: Hugo Pam, of Illinois; Address: John H. Wigmore, of Illinois.

Wednesday, September 3, 8:30 to 9:30 a. m.: Business Session; Election of Officers, etc.

Wednesday, September 3, 2:30 p. m.: Conclusion of the Discussion of Reports Presented during first session; Address by Dr. Thomas W. Salmon; Address by Dr. Katherine Bennett Davis.

Reception.

A reception will be given to the President and members and guests of the American Bar Association and to ladies accompanying them, on Wednesday, September 3, at 9:30 p. m., in the Ball Room, Copley-Plaza Hotel. *No tickets of admission will be required.*

Annual Dinner.

The Annual Dinner of the Association will be given in the Ball Room, Copley-Plaza Hotel, on Friday, September 5, at 7 p. m. George T. Page, of Illinois, President of the Association, will preside.

By joint invitation of the Massachusetts Bar Association and the Bar Association of the City of Boston, a dinner will be given at the same hour in the Foyer of the Ball Room, Copley-Plaza Hotel, to the ladies who accompany members and guests of the Association. *Tickets for the dinner to the ladies may be obtained at the Treasurer's office.*

Excursion.

By joint invitation of the Massachusetts Bar Association and the Bar Association of the City of Boston, an excursion to Plymouth (or to Lexington and Concord), Mass., is planned for Saturday morning, September 6, 1919. Return to Boston will be made in time to enable members to leave on late afternoon or evening trains. Tickets may be obtained at Secretary's Office.

New Members.

It is desirable that nominations of new members be submitted to the General Council at its first session on Wednesday morning. Forms and any information desired will be furnished by the Membership Committee, Secretary's Office, Copley-Plaza Hotel.

The dues are $6 a year for members, inclusive of cost of JOURNAL. Delegates who are not members pay no dues. There is no initiation fee. There are no additional dues for membership in a Section.

Hotel Reservations.

Reginald H. Smith, care Hale & Dorr, 60 State street, Boston, Mass., has kindly consented to take charge of the reservations for members and delegates. In writing to Mr. Smith, please state preference of hotel, time of arrival, period for which the rooms are desired, whether with or without bath, and how many persons will occupy each room.

Rooms at Copley-Plaza Hotel are available for Committee meetings, and will be assigned on application of Chairmen to the Secretary.

By order of the Executive Committee.

GEORGE WHITELOCK,
Secretary.
W. THOMAS KEMP,
GAYLORD LEE CLARK,
Assistant Secretaries.
1416 Munsey Bldg., Baltimore, Md.

PROGRAM OF THE MEETING OF THE MISSOURI BAR ASSOCIATION.

The 1919 Annual Meeting of the Missouri Bar Association and the Judicial Conference will be held at the Muehlbach Hotel, Kansas City, Mo., Thursday, Friday and Saturday, October 2, 3 and 4.

The first day, October 2, will be devoted exclusively to the Judicial Conference. The meeting has been so arranged as to permit practically all the judges of the state to attend the conferences and all are earnestly urged to be present.

The second and third days, October 3 and 4, will be occupied by the meetings and banquet of the Bar Association. All of the judges are invited to remain over and attend these meetings, and they are likewise urged to join the Bar Association. The annual dues are $5, which includes a ticket to the banquet which will take place at the Muehlbach Hotel, Saturday night, October 4.

This is the first time that the Judicial Conference and the meeting of the Bar Association have been held at the same time, and it is hoped that both the judges and the lawyers will take advantage of this opportunity to consider together those things pertaining to the Bench and Bar which should be changed and improved.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 170.

Firm Name, Fees—Division of professional fees of law firm with professionally inactive partner, as compensation for continuation of his name in firm name; disapproved.

A and B do business under the firm name of A & B although A, the senior partner, has not been in active practice since 1912, spending most of his time in the South where he has large business interests which take up all his time.

He is not financially interested except to share in the profits as compensation for the use of his name. He takes no active part in the firm's cases, knows nothing about them and gives no advice.

Is such an arrangement contrary to the best ethics of the profession, or contrary to Sec. 479 of the Judiciary Law?

ANSWER No. 170.

Though law-partnerships are not disapproved in this country by professional tradition or opinion (see Questions and Answers Nos. 67 and 161), still, in the view of the Committee, the payment of money for the use of a firm name by practicing lawyers is not to be approved, nor is it proper that such a partnership should continue, as in the case suggested, with a dormant partner not participating in the professional practice, though he may be under legal liability. This practice is too apt to beget the evils of increased commercialism and decreased sense of professional responsibility. In the expression of this view, the Committee does not include cases of partners whose active participation has been suspended on account of ill-health, old age, or temporary absence.

The Committee expresses no opinion upon the construction of Section 479 of the Judiciary Law.

QUESTION No. 171.

Divorce, Relation to Other Attorneys, Relation to Third Persons, Relation to Client—Attorney for husband sued for divorce in foreign jurisdiction, procuring, upon request of plaintiff's attorney, from husband, authorization to attorney in such foreign jurisdiction to appear for husband in said suit; proper conditions indicated.

Plaintiff without any collusion whatsoever brings an action for divorce against her husband in Reno. Her attorney in Reno sends a Power of Attorney to her attorney in New York requesting him to have the husband execute the same; such Power of Attorney appointing a lawyer in Reno to appear for husband and accept service of all papers, etc. Plaintiff's attorney in New York, knowing husband's New York attorney, consults said attorney, who agrees to procure his client's signature to said Power of Attorney, providing there is nothing improper in so doing.

Is it professionally improper for the attorneys in New York to procure such Power of Attorney from the husband?

ANSWER No. 171.

In the opinion of the Committee, the attorney for the husband should not be selected by the wife or her attorneys (see Q. and A. No. 25). And, in its opinion, the husband's attorneys should not participate in foisting upon the Nevada court a fictitious controversy. But assuming that the husband's attorneys are satisfied that a cause of action in good faith exists over which that Court has jurisdiction, it is not, in the opinion of the Committee, improper for them to advise their client to execute a Power of Attorney to attorneys selected by him for his appearance in the action, in order that any decree may be entitled to full faith and credit under the Constitution of the United States.

HUMOR OF THE LAW.

I had occasion recently to dictate a letter concerning two litigants whom I considered equally at fault, and I used the familiar expression, "both tarred with the same stick." The stenographer wrote it, "both tired of the same steak."—X.Y.Z., in The Docket.

"Hands up!" commanded the business-like highwayman.

The victim laughed as he complied.

"The joke is on you," he asserted, chuckling. "I just paid a large bill sent me by a lawyer for aiding me in filling out my income tax schedule. A month ago my landlord increased my rent. My son has returned from France, and cannot find a job. Yesterday my salary was decreased, and today the bank in which I kept the remnant of my money went to the wall. I've been looking all night for one of you chaps. I want to learn the hold-up business."

Weeping bitterly, the bandit handed over his revolver and vanished into the darkness. —Life.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Bankruptcy**—Joint Makers.—Where joint maker of a note, after becoming bankrupt, paid its face value to the other maker, who in turn paid payee, the payment may be recovered as a preference, if payee bank had reasonable cause to believe transfer would effect a preference, for the circuitous method of payment does not defeat recovery.—First Nat. Bank of Scottdale v. Blackburn, U. S. C. C. A., 256 Fed. 527.

2.——Judgment in Rem.—An adjudication in bankruptcy is a "judgment in rem," binding against all the world, in so far as it determines the defendant to be a bankrupt and his property subject to administration in bankruptcy.—Fidelity & Deposit Co. of Maryland v. Queens County Trust Co., N. Y., 123 N. E. 370, 226 N. Y. 225.

3. **Banks and Banking**—Refusing Payment.—Where bank wrongfully refuses to pay checks drawn upon it by merchant depositor having funds subject to check, depositor may recover substantial damages from bank; such refusal imputing insolvency, dishonesty, or bad faith of drawer.—McFall v. First Nat. Bank of Forrest City, Ark., 211 S. W. 919.

4. **Bills and Notes**—Renewal.—The giving of a renewal note does not create an estoppel preventing the urging of any defenses against it which the maker may have had against enforcement and collection of the original note.—Scandinavian-American Bank of Fargo v. Westby, N. D., 172 N. W. 665.

5. **Brokers**—Severable Contract.—A contract whereby a broker was to sell or trade real and personal property providing for a lump sum without reference to the separate value of any particular item held not severable as to the realty.—Rugh v. Soleim, Ore., 180 Pac. 930.

6. **Carriers of Goods**—Bill of Lading.—Where drawee of drafts with forged bills of lading attached pays payee who is innocent holder for value, it cannot thereafter, on discovering that goods have not been shipped and that bills of lading are fictitious, recover its loss from payee.—Howe Grain & Mercantile Co. v. A. B. Crouch Grain Co., Tex., 211 S. W. 946.

7.——Defect in Car.—A common carrier is not relieved of liability for loss of goods merely because shipper furnished car in which goods were loaded, where car was leased from third person, and where for use of car upon the road carrier pays owner, and loss of goods in transit is due to a defect in car.—Louisville & N. R. Co. v. Carr, Fla., 81 So. 779.

8.——Discrimination.—Where unjust discrimination arises as between individuals or localities, because of absorbing of switching charges in certain instances and not in others under like circumstances, carrier may be required to remove the discrimination by a change in tariff schedule eliminating the charges.—Lincoln Commercial Club v. Missouri Pac. Ry. Co., Neb., 172 N. W. 687.

9.——Robbery by Servant.—Failure to notify a common carrier that there was a safe in a cabinet containing valuable articles did not relieve carrier from liablity where its servants broke into the safe and stole the valuable articles.—Heuman v. M. H. Powers Co., N. Y., 123 N. E. 373, 226 N. Y. 205.

10. **Conspiracy**—Joint Tort-feasors.—In an action on the case for conspiracy, the conspiracy is not the gravamen of the charge, but may be both pleaded and proved as aggravating the wrong of which plaintiff complains, enabling him to recover in one action against all as joint tort-feasors.—National Bank of Savannah v. Evans, Ga., 99 S. E. 393.

11. **Contracts**—Abandonment.—The intention to abandon a contract at some fuure date is no breach of it, but when that intention is declared in positive terms and unconditionally, it has effect, in so far as promissor is able to do so, to repudiate contract itself and to terminate contractual relations between the parties.—Moore v. Jenkins, Tex., 211 S. W. 975.

12.——Fraud.—Where one signed a blank form of contract, not taking time to read the same, because the other party was in a hurry to take a train and leave town, relying on such other party to fill in the blanks in a certain manner, such other person agreeing to fill it in the desired manner, but failing to do so, he

cannot avoid the written contract on the ground of fraud.—Aetna Ins. Co. v. Detjen, Mo., 211 S. W. 911.

13.——Illegal Agreement.—Where an action is sought to be maintained on an illegal contract, the law will afford no relief, but will let the parties abide the consequences of their illegal agreement.—Southern Cotton Oil Co. v. Knox, Ala., 81 So. 656.

14.——Repudiation.—If one party to contract absolutely repudiates it before time for performance, the other party may treat such repudiation as a breach and sue for damages.—Sprague, Warner & Co. v. Iowa Mercantile Co., Iowa, 172 N. W. 637.

15. **Corporations**—Officers.—A corporation is not bound by the knowledge of its president or manager in a matter in which it is to his interests, conflicting with that of the corporation, to conceal such knowledge.—Blum v. Allen, La., 81 So. 760.

16.——Reorganization.—Mere reorganization and corporate succession did not of themselves render defendant company liable on the contracts of its predecessor, such liability depending upon terms of reorganizaion, or upon ratification, or both.—Smith v. Hutchinson Box Board & Paper Co., Kan., 180 Pac. 983.

17.——Subscription.—The integrity of a corporation and the interests of the public demand that the assets of the corporation consist of something more than its stockholders' debts, and therefore it cannot accept a stock subscriper's note in payment for his stock in view of Const. art. 12, § 6.—Washer v. Smyer, Tex., 211 S. W. 985.

18.——Subscription.—A subscriber to bank stock who gave his note therefor in violation of Const. art. 12, § 6, prohibiting issuance of corporate stock except for property actually received, is estopped to assert invalidity of transaction in suit to enforce the note for the benefit of creditors.—Thompson v. First State Bank of Amarillo, Tex., 211 S. W. 977.

19.——Subscription.—A stockholder cannot rescind a subscription to corporate stock while he holds the stock certificate and money received as dividends.—Mutual Loan Soc. v. Letson, Ala., 81 So. 659.

20. **Courts**—Jurisdiction.—Every court is bound to determine primarily the question of its own jurisdiction, and to decide all questions the decision of which is necessary to the determination of the question of its jurisdiction.—Elster v. Picou, La., 81 So. 710.

21. **Criminal Law**—Conspiracy.—Acts and declarations of a conspirator after consummation of the crime are admissible only against such conspirator and cannot be used against a co-conspirator.—Modello v. State, Tex., 211 S. W. 944.

22.——Former Conviction.—Defendant acquitted of charge of unlawfully keeping intoxicating liquors is not put in jeopardy a second time by prosecution for permitting another to keep intoxicating liquors on premises controlled by defendant, though the time and place of each offense were charged to be the same.—State v. Macek, Kan., 180 Pac. 985.

23. **Customs and Usages**—Wrongful Practice.—In an ejectment action where evidence had been introduced to show tha defendant cut and boxed timber on the land, it was proper to exclude plaintiff's evidence tending to show a general wrongful practice of persons to take timber from land without right, since a custom cannot lawfully prevail or be recognized that involved the doing of an unlawful thing.—United States Lumber & Cotton Co. v. Cole, Ala., 81 So. 664.

24. **Damages**—Particular Damages.—Where a plaintiff attempts by complaint to specify particular damages which he claims to have suffered from personal injuries, he thereby, at least to some extent, negatives any claim for damages other than those which he has specified.—Kurak v. Traiche, N. Y., 123 N. E. 377, 226 N. Y. 266.

25. **Deeds**—Construction by Court.—In construing deed, court will ascertain and give effect to the intention expressed without regard to whether it is in accordahce with court's ideas as to what provisions of deed should have been.—McIntosh v. Kolb, S. C., 99 S. E. 356.

26. **Descent and Distribution**—Death Presumed.—Proof of death of owner of land raises presumption that land descended to his heirs at law; such presumption not being overcome by evidence that he left a will, in absence of evidence as to how land was devised thereby.—Pinckney v. Knowles, S. C., 99 S. E. 354.

27. **Disorderly House**—General Reputation.—In a prosecution for keeping a lewd house, evidence of its general reputation may be considered in corroboration of the circumstances.—Wilkes v. State, Ga., 99 S. E. 390.

28. **Divorce**—Abandonment.—The mere fact that the husband and wife sleep in separate beds, or in separate rooms, however long continued, can furnish no legal evidence of abandonment of either by the other, nor be regarder as an obstacle to the connubial happiness of the parties.—Burton v. Burton, Ky., 211 S. W. 869.

29. **Dower**—Priority.—The right of redemption from a mortgage foreclosure was prior and paramount to any right of which the wife of the purchaser was dowable.—Wootten v. Vaughn, Ala., 81 So. 660.

30. **Eminent Domain**—Public Highway.—The taking of land for a public highway is a taking for public use.—Sipe v. Borough of Tarentum, Pa., 106 Atl. 637.

31. **Estoppel**—Equity.—If there must be loss or damage, equity requires that it should fall on the party responsible for the condition which makes the loss inevitable.—White Marble Lime Co. v. Consolidated Lumber Co., Mich., 172 N. W. 603.

32. **Evidence**—Contradiction of Writing.—Parol evidence is inadmissible to contradict or vary the terms of the writing which the parties have drawn up to serve as the evidence of their contract, a rule applicable only in suits between the parties to the instrument and their privies.—Commercial Germania Trust & Savings Bank v. White, La., 81 So. 753.

33.——Fraud.—In an action to set aside a conveyance as in fraud of creditors, while an attorney who acted as scrivener could testify as to the circumstances of the transaction, what was told him by the parties was not evidence of the facts stated by them.—Van Allen v. Sprague, Mich., 172 N. W. 532.

34.——Parol.—The due date of mortgage cannot be varied by parol evidence.—Formby v. Williams, Ala., 81 So. 682.

35.——Physical Facts.—In determining the speed of a train from the distance required to stop it, courts and juries may consider ordin-

ary observations of the law of nature or physics as to power and weight affecting momentum. —Fayet v. St. Louis & S. F. R. Co., Ala., 81 So. 671.

36.——Presumption of Law.—A "presumption of law" is a mandatory deduction which the law expressly directs to be made from the particular facts, and which cannot be disregarded by the jury, while, in distinction, an "inference" is only a permissible deduction which the reason of the jury makes without an express law to that effect.—Joyce v. Missouri & Kansas Telephone Co., Mo., 211 S. W. 900.

37.——Secondary Evidence.—To introduce parol evidence of the contents of a written contract the party offering such evidence must show that original contract was lost or destroyed or beyond his control.—McCoy v. Wosika, Okla., 180 Pac. 967.

38. **Fraud**—Conspiracy.—The seller of furniture in a rooming house to one who paid in cash and note secured by mortgage could not recover damages from the purchaser and another, charged to have conspired to create a pretended security, by execution of mortgage without actual consideration, unless he suffered some injury.—Martin v. Moreland, Ore., 180 Pac. 933.

39.——False Representations.—False representations as to the value of a business and as to the profits therefrom peculiarly within the seller's knowledge and inducing the sale may be relied on by the purchaser though he has physically inspected the property.—Warwick v. Corbett, Wash., 180 Pac. 928.

40. **Frauds, Statute of**—Memorandum.—No note or memorandum whatever is required of a contract of sale of land, if a part of the purchase price is paid and the vendee put in possession.—Penney v. Norton, Ala., 81 So. 666.

41.——Original Undertaking.—A contract of insurance of fidelity of employes is an original undertaking insuring against loss through their dishonesty, and is not within statute of frauds (Gen. St. 1913, § 6998), requiring a special promise to answer for the debt, default, or doings of another to be in writing.—Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co., Minn., 172 N. W. 693.

42. **Fraudulent Conveyances**—Presumption of Fraud.—While a presumption of fraud arises where an absolute deed is intended as security, and casts the burden on the mortgagee to show that the transaction was fair, the rule has no application where the trust relation created by an absolute deed which was in fact a mortgage had been terminated by the execution of deeds from both the mortgagor and mortgagee before the debts of plaintiffs, who sought to attack the conveyances, came into existence.—R. M. Sutton Co. v. Wells, N. C., 99 S. E. 365.

43. **Gas**—Irreparable Injury.—An unlawful interruption of the service rendered by a gas company under a contract with municipality may be an irreparable injury to consumers, which equity may remedy by appropriate injunction at suit of resident consumers for whose benefit the service contract is made, in view of Gen. St. 1906, § 1365.—Miami Gas Co. v. Highleyman, Fla., 81 So. 775.

44. **Homestead**—Mutual Deeds.—Where it was always stipulated that title was to pass only through mutual deeds, the title to homestead property did not pass until delivery of deeds.—Henderson v. Texas Moline Plow Co., Tex., 211 S. W. 973.

45. **Homicide**—Corpus Delicti.—In a homicide case it is not necessary to show the finding of the dead body and its condition by medical testimony, it being sufficient to show the finding of a dead body, and the appearance thereof showing acts of violence.—People v. Jackzo, Mich., 172 N. W. 557.

46.——Dying Declaration.—A statement by a person, "Yes, he got me," was not admissible in evidence as a dying declaration, where it was not proven that the wounded man believed he was dying when he made the declaration.—State v. Williamson, La., 81 So. 737.

47. **Husband and Wife**—Abondonment.—That plaintiff had abandoned her husband, would not necessarily preclude her recovery.—Cramer v. Cramer, Wash., 180 Pac. 915.

48. **Indemnity**—Bill of Lading.—A carrier signing three bills of lading made out by shipper, but receiving only two carloads, and forced to reimburse a party advancing money on third bill of lading, may recover amount so paid from shipper.—Philadelphia, B. & W. R. Co. v. Roberts, Md., 106 Atl. 615.

49. **Insurance**—Cancellation.—Generally an agency to procure insurance does not necessarily confer the power to cancel insurance, for such agency terminates when the insurance is procured and the policy delivered to the principal.—Stewart v. Coleman & Co., Mich., 81 So. 653.

50.——Fraud.—Fraud vitiates any transaction into which it enters, and fraud on the part of insured will render the insurance contract void, without any express provision to that effect in the policy.—Hardy v. Sovereign Camp, Woodmen of the World, Ala., 81 So. 690.

51.——Settling Suits.—One who insures another against liability for accidents owes the insured the duty of settling with an injured person before suit, if that is the reasonable thing to do, and is liable to the insured for negligent failure to do so after assuming control of the claim.—Cavanaugh Bros. v. General Accident, Fire & Life Assur. Corporation, N. H., 106 Atl. 604.

52. **Intoxicating Liquors**—Bone Dry Law.—The Bone Dry Law is a valid exercise of the states police power, designed to secure a more effectual enforcement of earlier anti-liquor legislation, and offends neither state nor federal Constitution.—State v. Macek, Kan., 180 Pac. 985.

53. **Joint-Stock Companies**—Limited Partnership.—A deed to a limited partnership is a deed to the partnership as a distinct entity.—First Nat. Bank v. Vanden Brooks, Mich., 172 N. W. 582.

54. **Judgment**—Fraud in Procurement.—A judgment infected with fraud and collusion is open to attack whenever or wherever it conflicts with the rights or interests of third persons, in view of Civ. Code 1910, § 5964.—Crawford v. Williams, Ga., 99 S. E. 378.

55.——Injunction.—Equity has jurisdiction to enjoin the enforcement of a common-law judgment.—Noyes v. Noyes, Mass., 123 N. E. 395.

56.——Non-Suit.—A non-suit upon insufficient evidence is not an adjudication, but allows plaintiff to sue again.—Standard Iron Works v. Southern Bell Telephone & Telegraph Co., U. S. D. C., 256 Fed. 548.

57. **Landlord and Tenant**—Option by Lessee. —Where lessee is expressly given contingent option to continue lease in effect or terminate it before stated term, and where lessee gives notice of election without surrender of possession of premises and continues in possession paying rent, he becomes, under Acts 1905, c. 5441, a tenant at sufferance or a tenant at will.—Bettilini v. W. H. Metcalf Co., Fla., 81 So. 777.

58. **Life Estates**—The statute of limitations does not begin to run in favor of a life tenant who claims the entire estate in his own right as against the remainderman until such claim is clearly brought home to the remainderman. —Anderson v. Miller, Neb., 172 N. W. 688.

59. **Master and Servant**—Collision.—An employer is not liable to a servant unexpectedly injured in a collision with another servant while boarding a wagon.—Munn v. Michigan State Telephone Co., Mich., 172 N. W. 592.

60.——Fellow Servants.—Whether duty of motorman of work train to give warning signals before starting the train was a mere detail of work performable by him as the fellow servant of plaintiff, who also was working on the train, held a question for the jury.—Lange v. Spokane & I. E. R. Co., Wash., 180 Pac. 924.

61.——Ordinary Usage.—The test of negligence in methods, machinery, and appliances is the ordinary usage of the business, and that test is applicable to allegations of contributory negligence.—Ulm v. McKeesport Tin Plate Co., Pa., 106 Atl. 639.

62. **Mechanics' Liens** — Co-Tenants. — Where claimed mechanics' lienors proceed against two sisters, co-tenants, as owners, describing them as such, and alleging that the labor and materials were supplied with their consent, and it appears that one sister only consented, within the meaning of the mechanics' lien statute (Rev. Laws, c. 197), to the doing of the work, the lienors can nevertheless enforce their lien against her interest in the land alone.—Roxbury Painting & Decorating Co. v. Nute, Mass., 123 N. E. 391.

63. **Monopolies**—Exclusive Agency.—The appointment by a manufacturing corporation of another corporation as its exclusive selling agent is not a violation of any right of third persons, under the common law or the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830).—Baran v. Goodyear Tire & Rubber Co., U. S. D. C., 256 Fed. 571

64. **Mortgages**—Redemption. — A redemption sale, if really such, and not a pignorative contract, must be given the effect of a redemption sale and not of such a contract.—Butler v. Marston, La., 81 So. 749.

65.——Rents and Profits.—A junior mortgagee purchasing at a sale under a power contained in a prior mortgage is entitled to the rents and profits while in possession, without having them applied to the payment of his debt.—Wooten v. Vaughn, Ala., 81 So. 660.

66. **Municipal Corporations** — Governmental Function.—While a city, in its governmental capacity as proprietor of bathing beach, is not liable for negligence of agents and officers, nevertheless, being engaged in business of furnishing water to private consumers, in such respect it acts in a private capacity, and is bound to exercise ordinary care, and for failure is liable for injuries proximately caused.—Nemet v. City of Kenosha, Wis., 172 N. W. 711.

67. **Navigable Waters**—Riparian Rights.—As to whether title to the beds of navigable streams is in the state, or belongs to the respective opposite riparian owners to the thread thereof, is a matter of local law which each state determines for itself.—Shortell v. Des Moines Electric Co., Iowa, 172 N. W. 649.

68. **Partition**—Personal Property.—Where all parties concerned in partition sale agreed that growing corn should not pass with land, the agreement was valid, and corn became personal property so far as they were concerned.—Clauson v. Larman, Mo., 211 S. W. 912.

69. **Partnership** — Dissolution. — A common-law assignment for the benefit of creditors made by co-partners dissolves the partnership.—Johnson v. Bruzek, Minn., 172 N. W. 700.

70.——Partners as Agents.—A man who enters into a partnership for only one purpose is not liable for the purchases of the other partner, unless used in that business, or the articles are of the kind usually and customarily bought for such an undertaking, existing or as represented to exist.—Iroquois Rubber Co. v. Griffin, N. Y., 123 N. E. 369, 226 N. Y. 297.

71. **Payment**—Application of.—As between a debtor owing several debts and his creditor, the debtor paying a sum of money may designate to which of the debts it shall be applied, or, on his failure to do so, the creditor may apply it as he sees fit.—Farr v. Weaver, W. Va., 99 S. E. 395.

72. **Physicians and Surgeons**—Diagnosis.—A physician is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making a diagnosis prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should be done in accordance with recognized authority and good current practice.—Brewer v. Ring, N. C., 99 S. E. 258.

73. **Principal and Agent** — Ratification. — Where initial carrier, sued for damages to freight, notified connecting carrier, which settled with plaintiff without initial carrier's knowledge, the initial carrier's subsequent drawing up and filing for plaintiff a stipulation dismissing the suit was a ratification of the act of judgment in making a diagnosis in prethe settlement being for benefit of both carriers.—Wilson v. St. Joseph & G. I. Ry. Co., Mo., 211 S. W. 897.

74.——Testimony of Agent.—An agent is competent to testify to his agency; the rule being that his authority may be established by his testimony, but not by his declarations.—Hileman v. Falck, Pa., 106 Atl. 633.

75. **Railroads**—Statutory Signals.—It is duty of those in charge of trains, not only to give required statutory signals for exceptionally dangerous crossings, but also, if ordinary care for safety of travelers on highway require it, to employ such other methods to warn travelers of approach of train as may be considered necessary by prudent persons in operating trains.—Louisville & N. R. Co. v. Scott's Adm'r, Ky., 211 S. W. 747.

76. **Sales**—Good Will.—Purchaser of lease, good will, and furniture, etc., of fashionable hotel, furnished from various quarters and all sorts of dealers with rare articles, was entitled to rely on seller's representations as to identity and value of property, and was not bound to inform herself, on consummation of sale, that articles she had bargained for were intact on premises.—Fay v. Mathewson, Cal., 180 Pac. 939.

77.——Title.—One who purchases chattels from another acquires no better title than his vendor had, although he purchases without notice of any infirmity in the title and for a valuable consideration.—Barrow v. Brent, Ala., 81 So. 669.

78.——Uncertainty.—Contract whereby lumber company agreed exclusively to sell wood slabs to a lime company for fuel, so far as the production of its mill would permit, held not uncertain or ambiguous.—White Marble Lime Co. v. Consolidated Lumber Co., Mich., 172 N. W. 603.

79. **Statute of Limitations**—Stale Demand.—The doctrine of stale demand is a purely equitable one, and only arises whenever from the lapse of time it would be inequitable to allow a party to enforce his legal rights.—Stanley v. Reeves, Ga., 99 S. E. 376.

80. **Vendor and Purchaser**—Earnest Money.—Only if vendor had tendered an abstract and deed in accordance with the contract, and the purchaser had refused to accept, could vendor exact a forfeiture of earnest money.—Osborne v. Fairley, Ark., 211 S. W. 917.

81.——Option.—In a written agreement for sale of land, the word "option" must be presumed used in its usual and legal sense; and, where purchaser bound himself to nothing beyond the nominal payment made, and had a period within 90 days in which he could complete a purchase, if he desired, but vendor was bound to sell, the contract must be construed as an option, and not an agreement of agency.—Porter v. Carney, Iowa, 172 N. W. 644.

82. **Wills**—Testamentary Capacity.—No degree of mental decay is sufficient to deprive a person of testamentary capacity which does not deprive him of an intelligent comprehension of the estate he is devising, or of his capacity to appreciate the nature and effect of the distribution he makes.—In re Byrne's Will, Iowa, 172 N. W. 655.

83.——Unnatural Bequest.—While seemingly unjust and unnatural bequests are not alone sufficient evidence of mental incapacity or undue influence, they may impose on the proponent the necessity of giving some reasonable explanation of the will's unnatural character, or at least of showing that its character is not the offspring of mental defect.—Johnson v. Shaver, S. D., 172 N. W. 676.